Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM .....

No. 79-975

DAVID BELL

Petitioner,

v.

STATE OF NEW YORK

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

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I. OPINIONS OF THE COURTS BELOW

Bell vs. State of New York, 78 Civ2934 (SDNY)

Bell vs. State of New York, 79-2187 (CA -2nd)
(No opinion)

II.JURISDICTION

1. Jurisdiction of this court issues from 28 USC 1254 sub 1

III. QUESTION PRESENTED FOR REVIEW

The threshold question of this habeas corpus proceeding rests upon whether the collateral consequences of petitioner's conviction and sentence are severe enough to place him 'in custody', although he is not now or was not ever incarcerated.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Title 28 USC sect. 2254
2. The 14th amendment of the United States Constitution.

V. WHEN QUESTION WAS RAISED

Question was first raised in the United States District Court of theSouthern District of New York with the filing of a petition for habeas corpus under 28 USC 2254 on May 25, 1978.

VI. STATEMENT OF CASE

On July 4, 1975, petitioner was accosted in his own business establishment by 3 persons claiming to be police - but without any identification. During the incident, one warning shot was fired by petitioner. Later he was arrested by uniformed local policeman.

On April 20, 1976, after trial, petitioner was convicted of two counts of reckless endangerment in second degree and resisting arrest in the Sullivan County Court of the State of New York and sentenced to one year probation and fined $ 1500.

On May 25, 1978 a petition for habeas corpus was filed in the United States District Court of the Southern District of New York.

On April 30, 1979 the petition was denied by the District Court.

On May 23, 1979 petitioner appealed to the Court of Appeals for the second circuit. On November 30, 1979 the judgement of the lower court was affirmed without opinion.

VII. BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE.

Jurisdiction arose from 28 USC 2254 and the 14th amendment of the United States Constitution.

VIII. ARGUMENT

Point 1. Reasons why this court should grant review of the writ.

Although the lower courts have recognized that the writ ofhabeas corpus has been extended over the years to go beyond incarceration; each circuit has defined the civil restraints- which survive the conviction- to warrant being 'in custody', on an ad hoc basis. Such a rule of law which makes Federal adjudication dependent upon the accident of petioner's domicile, is an untenable legal concept.

Secondly, the Court of Appeals in affirming the district court's judgement (without opinion) accepted that court's subjective view that petitioner's conviction was of a trivial nature and only equivalent to a fine. This view is controverted by the record. Although petitioner was not incarcerated, the sentence of one year probation hung like a sword over petitioner's head withan implied threat of control by the court or even re-sentencing during the probationary period. " It is not physical custody that gives standing to habeas corpus it is instead the restraint on liberty whether physical or of amore subtle nature." Glover vs McCarthy, 301 F Supp. 364.

This court should rule whether a first offender(i.e. like petitioner) trapped by cicumstances, is less equal under the law than the numerous recidivists being allowed relief, who are not in actual physical custody. (See citations infra)

Point II.- The collateral consequences of the conviction are severe enough to warrant petitioner as being 'in custody'.

The United States Supreme Court in Carafas vs La Vallee, 391 US 234(cited by the district court) fully recognized that serious collateral consequences may flow from a conviction and continue to restrict a persons freedom even after he has completed his sentence.

Petitioner submits that the severity of the sentence is not of itself related to the possible severity of the collateral consequences which survive it. See Clay vs. Riddle, 4th circ. 541 F 2d 456 which involved a traffic offense and a 30 day sentence.

The question of whether the surviving consequences are serious enough to warrant as being'in custody' is subjective and must be viewed in the context of backround, character and reputation of the petitioner.

To this petitioner, the moral and spiritual weight of the conviction and sentence is a cross he cannot bear, and he submits that were it otherwise he would not be here before this court seeking relief.

Up to this abortive incident, petitioner, for 58 years, had been a peace loving law-abiding citizen, never accused or arrested for any violation of law. Petitioner was active in civic affairs in the community and whose character and good reputation was attested to by leading citizens and two judges.

To the humiliation of the arrest, trial and conviction and attendent exetensive publicity must be added the civil disabilities of the conviction, spelled out in New York State statutes. Based on these statutes a certificate of relief from some of these disabilities was granted by the State of New York to this petitioner. The certificate is not absolute or final and is revokable. Petitioner cannot hold public office or be an officer in any union, the certificate states thatit," shall not prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction- as a basis for the excercise of it's discretionary power to suspend, revoke, refuse to issue or renew any license, permit or other authority or privilege."

In light of the aforementioned restraint of his civil rights, is it not clear that petitioner, " is suffering and will continue to suffer serious disabilities because of the laws complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious." Carafas supra at 239.

On the other hand, clearly to a person who has been previously incarcerated or arrested before, the conviction and sentence of petitioner would be considered trivial, accepted and even welcomed.

Although the merits of petitioner's claim are now, not at issue; he submits that the record fully supports his allegations that he was denied a fair trial, guaranteed by the 14th amendment of the United States Constitution, that the conviction was a gross miscarriage of justice and that there are ample and sufficient grounds for reversal of the conviction on the merits.

CONCLUSION

The Court should clearly define the scope of the collateral consequences -which survive the conviction-, so that the ad hoc decisions of the courts below - repugnant to the concept of equal justice - would be obviated.

This petition for Writ of Certiorari should be granted, and full argument heard by this court on the merits of petitioner's claim.

Dated: December 10, 1979
Monticello N.Y.

Respectfully,

David Bell
Petitioner, pro se

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of November,1979

PRESENT: Hon. William H. Mulligan
Hon. ThomasJ. Meskill
Hon. Amalya L. Kearse

Circuit Judges

David Bell,
Petitioner-Appellant

-against-

78-2187

State of New York,
Respondent- Appellee.

Appeal from the United States District Court for the Southern District of N.Y.

This cause came on to be heard on the transcript of record from the U.S. District Court for the Southern District of N.Y. and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District Court be and it hereby is affirmed on the opinion below of Hon. Robert L. Carter, 78 Civ 2934 (SDNY April 30, 1979)

William H. Mulligan
Thomas J. Meskill
Amalya L. Kearse

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Bell,
Petitioner,

-against-

78 Civ 2934 (RLC)

State of New York,
Respondent.

APPEARANCES

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CARTER,D.J.

OPINION

David Bell has filed a petition for a writ of habeas corpus pursuant to 28 USC 2254 challenging his conviction for the crimes of reckless endangerment in second degree, N.Y. Penal Law 120.20 (McKinney)and resisting arrest, N.Y. Penal Law 205.30 (McKinney). The state opposes the petition and has submitted an affidavit

FACTS

Based upon the briefs submitted by both parties and the transcript of the trial, the relevant facts may be summarized as follows: In the early morning hors of July 4, 1975, Bell, general manager of a motor lodge, was called to the establishments lounge because of some altercation. Upon entering the lounge armed with a pistol, petitioner encountered two individuals engaged in conversation with Chester Shapiro, the motel lodge's bar manager. These individuals were undercoverpolice officers who, shortly before Bell's arrival on the scene,had arrested Shapiro for allegedly soliciting an undercover police officer to engage in prostitution and for offering her a white powder that was alleged to be cocaine. When the policeofficers informed petitioner of their identity he demanded indentification, There is some conflict in the testimony as to the officers response. They have testified that Bell refused to permit them to produce the identification, but Bell claims that the officers simply refused to respond to his request, Petitioner then forced the officers out of the lounge at gunpoint, and Shapiro left.After ejecting the officers from the premises, petitioner fired a single warning shot. Upon leaving the lounge a short time

later, petitioner approached two uniformed police officers near the motor lodge and was arrested.

Bell was subsequently indicted and brought to trial before ajury in the County Court of Sullivan County. On April 20, 1976, he was convicted of the crimes of reckless endangerment in second degree andresisting arrest, and was sentenced to a one year cnditional discharge and a fine of $ 750 on each count. Petitioner paid the $ 1500 fine on April 21, 1976 and was never incarcerated.

On January 9, 1978, the judgement was affirmed by the Appellate Division, Third Department. The Court of Appeals (Jones,J.) denied leave to appeal on February 21, 1978, and it also denied applications for reconsideration on March 10 and April 11, 1978. Petitioner filed this petition on June 28, 1978.

DISCUSSION

Petitioner seeks to overturn the state court's judgement on the ground that he was convicted without due process of law (U.S. Constit. Amend. XIV) He advances a variety of arguments in support of his petition. First, Bell was indicted jointly with the bar manager, Shapiro, who was prosecuted for prostitution and possession of narcotics. This, Bell claims, improperly prejudiced the Grand Jury against him. because it implied he was connected with the charges brought against Shapiro. Second, Bell claims inflammatory statements made to the news media by police prevented him from receiving a fair trial by an impartial jury. Next, Bell asserts that police officers were permitted at

trial to give inflammatory and hearsay testimony concerning their alleged transactions with Shapiro, thereby improperly prejudicing the jury against petitioner, Bell argues generally that he was improperly denied the opportunity to raise certain arguments or introduce certain evidence ar trial and, finally that the New York State Police and State Liquor Authority conspired to influence the trial and obtain a conviction.

The Threshold issue in a petition brought under 28 USC 2254(L) is a determination of whether"a person is in custody pursuantto the judgement of the state court. ....." A writ of habeas corpus is an extraordinary remedy that will not lie unless subtantial restraints are placed upona person's freedom. Faye vs Noia. 372 Us 391, 83 S.CT. 822, 9 L Ed 2d 837 (1963); Roddy vs Black, 516 F 2d 1380, 1383 (6th circ1975) Cert denied, 423 US 917, 96 S Ct. 226, 46 L Ed 2d 147; United States ex rel La Near vs La Vallee 306 F 2d 417 (2d Cir. 1962)

Petitioner is correct when he argues that the definition of custody has been expanded beyond the scope of physical detention. In Carafas vs. La Vallee391 US 234, 88 S Ct. 1556, 20 L Ed 2d 554 (1968), the Supreme Court recognized that seriouscollateral consequences may flow from a conviction and continue to restrict a person's freedom even after he has completed his sentence. This doctrine of collateral consequences has most often been invoked in cases where a court maintains jurisdiction over a petition after the petitioner has been released from physical confinement. See Carafas vs La Vallee supra, 391 Us at 239. Neverthless, a writ may also lie where the petitioner has never been confined, but suffers collateral

consequences so severe as to be tantamount to custody.

However, a close inspection of the conditions attached to Bell's one year conditional discharge discloses no restrictions harsh enough to constitute custody. Petititioner was merly directed " to avoid any injurious or viscious habits, ... refrian from frequenting unlawful places and consorting with disreputable persons; ... and refrian from any further violations of the law. Stenographic minutes of Trial People v. Bell p. 973. Petitioner's sentence was therefore analogous to a fine-only conviction, for which federal habeas corpus will not lie. Hanson v. Circuit Court of First Judicial Circuit of Illinois , 591 F 2d 404(7th Cir. 1979).

Petitioner further alleges that the damage to his good name and reputation are equivalent to custody, The Proposition is without merit. Its adoption would render the custody prereqüisite meaningless, since every person convicted of a violation, no matter how minor,could claim reputational damage. Petitioner's final allegation that he suffers from civil disabilities is unsubstantiated by the record. It is true that habeas corpus review may be appropriate where the collateral consequences of the conviction impose severe burdens on the petitioner by for example, preventing him from voting, serving as a juror or union official, engaging in certian businesses, or obtaining a firearms permit or drivers license. Carafas vs La Vallee, supra, 391 Us at 237; Justin vs Jacobs449 F 2d 1017, 1019(DC Circ. 1971), However, since the crimes of which Bell was convicted are

misdemeanors rather than felonies, he is deprived of neither his right to vote, N.Y. Election Law 5-106(2) (McKinney), nor his real estate broker's license, N.Y. Real Property Law, 440-a (Mc Kinney). Carafas indicates that only severe restraints will satisfy the " in custody"requirement, and petitioner has failed to allege any specific disabilities.

Accordingly, the petition is denied.

IT IS SO ORDERED.

Dated: New York N.Y.
April 30, 1979

Robert L. Carter
U.S.D.J.